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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 UNITED STATES OF AMERICA,

5 v.

19 CR 297 (PAE)

6 JOSE PEREZ,

7 Defendant.
-----x

8 New York, N.Y.
9 April 24, 2019
10 10:15 a.m.

11 Before:

12 HON. PAUL A. ENGELMAYER,

13 District Judge

14 APPEARANCES

15 GEOFFREY S. BERMAN
16 United States Attorney for the
17 BY: JACOB FIDDELMAN
18 Assistant United States Attorney

19 FEDERAL DEFENDERS OF NEW YORK
20 Attorneys for Defendant
21 BY: SYLVIE J. LEVINE

J4OsPERA

1 (Case called)

2 MR. FIDDELMAN: Good morning. Jacob Fiddelman for the
3 United States.

4 THE COURT: Good morning, Mr. Fiddelman.

5 MS. LEVINE: Good morning, your Honor. Federal
6 Defenders of New York by Sylvie Levine on behalf of Mr. Perez.

7 THE COURT: All right. Good morning, Ms. Levine, and
8 good morning to you, Mr. Perez.

9 THE DEFENDANT: Good morning, sir.

10 THE COURT: All right. Mr. Fiddelman, this is our
11 initial conference in the case. Tell me about the case.

12 MR. FIDDELMAN: Yes, your Honor.

13 In this case, the defendant engaged in phone app
14 communications, followed by an extensive series of text
15 messages, with someone whom he believed to be a 12-year-old
16 girl for the purposes of meeting up and engaging in sexual
17 activity. The individual with whom he was corresponding was,
18 in fact, an undercover detective.

19 After an extensive exchange of text messages,
20 including the defendant sending lewd photographs of himself
21 and requesting pornographic photographs of the undercover, a
22 meeting was set up, the defendant showed up, and he was in the
23 possession of an additional cell phone, which he had previously
24 claimed he was bringing as a gift for the 12-year-old girl.

25 So the defendant was then apprehended at the place of

J4OsPERA

1 the prearranged location.

2 THE COURT: When was the arrest?

3 MR. FIDDELMAN: The arrest was October 24, 2018. The
4 defendant was then presented on October 25.

5 Since that time, the parties have been engaged in
6 extensive discussions regarding a disposition of the matter.

7 THE COURT: Six months is extensive.

8 MR. FIDDELMAN: Yes.

9 Defense counsel has submitted a written mitigation
10 package to our office which, as your Honor is well aware, is a
11 very long process involving a psychiatric evaluation, followed
12 by review within the U.S. Attorney's office by a committee, all
13 with the hopes of determining what charges should be filed
14 against the defendant with respect to which statutes carry
15 which mandatory minimums.

16 The matters have moved forward in that process
17 significantly, but it is not yet complete. We are awaiting a
18 supplemental submission from the defense, at which time the
19 government hopes to promptly turn around a decision, and I
20 believe all parties are optimistic that there will be a
21 resolution in this case one way or another.

22 THE COURT: OK. But in the middle of that process,
23 the decision was made to bring the case to the district court
24 level and cease rolling over the orders of continuance?

25 MR. FIDDELMAN: That is exactly correct, your Honor.

J4OsPERA

1 THE COURT: All right. Then I guess the first order
2 of business at this point is then for me to arraign the
3 defendant on the information, correct, Ms. Levine?

4 MS. LEVINE: That's right.

5 THE COURT: Ms. Levine, anything I need to be aware of
6 before embarking on that process?

7 I take it you have reviewed with Mr. Perez the
8 questions I'm apt to put by way of an arraignment?

9 MS. LEVINE: That's correct, your Honor.

10 We are happy to move forward with that process and I'm
11 happy to discuss somewhat further the --

12 THE COURT: The schedule.

13 MS. LEVINE: Exactly.

14 THE COURT: Very good.

15 Mr. Smallman, would you kindly place Mr. Perez under
16 oath.

17 (Defendant sworn)

18 You may be seated.

19 Mr. Perez, do you understand that you're under oath,
20 and that if you answer any of my questions falsely, your
21 answers to my questions may be used against you in another
22 prosecution for perjury?

23 THE DEFENDANT: Yes, I understand.

24 THE COURT: You may be seated.

25 THE DEFENDANT: Thank you.

J4OsPERA

1 THE COURT: I'm going to ask you a number of questions
2 beginning with questions about your mental health and the use
3 of drugs and alcohol. I'm not trying to pry. I just need to
4 make sure that you have a clear mind today.

5 THE DEFENDANT: I understand.

6 THE COURT: At the end of those questions, I'm going
7 to ask you about how you plead to the charges, and I will also
8 make sure that you are knowingly waiving your right to be
9 charged by indictment. OK?

10 THE DEFENDANT: Yes.

11 THE COURT: What is your full name?

12 THE DEFENDANT: Jose Perez.

13 THE COURT: How old are you?

14 THE DEFENDANT: 64 years old.

15 THE COURT: How far did you go in school?

16 THE DEFENDANT: I have two years of college.

17 THE COURT: Where was that?

18 THE DEFENDANT: Marist.

19 THE COURT: Harrison, New York?

20 THE DEFENDANT: Poughkeepsie, yes.

21 THE COURT: In Poughkeepsie.

22 Have you ever been treated or hospitalized for any
23 mental illness?

24 THE DEFENDANT: No.

25 THE COURT: Are you now or have you recently been

J4OsPERA

1 under the care of a doctor or a psychiatrist?

2 THE DEFENDANT: Psychiatrist, no.

3 THE COURT: Doctor?

4 THE DEFENDANT: Doctor, yes. I go -- I got -- I had
5 two strokes, I have COPD, restless leg syndrome, my vertigo is
6 whacked out, my memory is leaving. So yeah.

7 THE COURT: OK. You've had a number of conditions for
8 which you've gotten medical treatment?

9 THE DEFENDANT: Right.

10 THE COURT: Let me ask you, are you currently taking
11 any medication for any of those conditions?

12 THE DEFENDANT: Yeah. Yes.

13 THE COURT: Do you remember what those medications
14 are?

15 THE DEFENDANT: No, I just -- I got them in the house
16 in the pill box. I just ...

17 THE COURT: The record will reflect that Mr. Perez was
18 just acting out the process of going through a pill box and one
19 by one extracting the pills and taking them.

20 Here is the important question, Mr. Perez. Are any
21 of the medications you're taking either on their own or in
22 combination, do any of those medications impair your ability to
23 understand what is happening around you?

24 THE DEFENDANT: No.

25 THE COURT: Do any of them impair your ability to

J4OsPERa

1 communicate?

2 THE DEFENDANT: No.

3 THE COURT: Do any of them impair your ability to make
4 clear-headed decisions?

5 THE DEFENDANT: No.

6 THE COURT: OK. In the past 24 hours, apart from the
7 medications you take for those conditions, have you taken any
8 drugs, medicine, pills, alcoholic beverages, anything like
9 that?

10 THE DEFENDANT: No, sir.

11 THE COURT: Is your mind clear today?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Do you understand what is happening in
14 this proceeding?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Ms. Levine, I take it you've spent a lot
17 of time with your client over the past six months?

18 MS. LEVINE: That's correct, your Honor.

19 THE COURT: Do you have any doubt as to his competence
20 to enter a plea to waive indictment and then enter a plea to an
21 information today?

22 MS. LEVINE: I do not.

23 If I could just have one second?

24 THE COURT: Of course.

25 (Counsel conferring with defendant)

J4OsPERA

1 MS. LEVINE: Your Honor, could we add just one more
2 fact?

3 THE COURT: Yes, of course.

4 THE DEFENDANT: I have to go tonight. Pretrial is
5 sending me to a psychiatrist tonight.

6 MS. LEVINE: There is a mental health treatment
7 condition of the bail, and I just --

8 THE COURT: It begins tonight?

9 THE DEFENDANT: Tonight.

10 THE COURT: Thank you for telling me. I think your
11 answer was accurate, but there is more context, it is more
12 complete because of what you have told me, and I appreciate it.

13 THE DEFENDANT: Every Saturday I go to -- I started
14 going to a therapist that pretrial asked me to go.

15 THE COURT: I see.

16 Ms. Levine, can you proffer at all what the nature of
17 that is?

18 MS. LEVINE: So there was a mental health condition as
19 part of the bail package, and it didn't get enacted, frankly,
20 until very recently.

21 Now, in accordance with the original bail order, the
22 pretrial services office has sent him for -- it's for drug
23 treatment and mental health.

24 THE COURT: I see. That is commencing tonight?

25 MS. LEVINE: I'm sorry?

J4OsPERA

1 THE COURT: That is commencing tonight?

2 MS. LEVINE: So he did the initial intake in the last
3 few weeks, the group started on Saturday, and now they are
4 sending him for a psychiatric evaluation.

5 THE COURT: Understood. Thank you. Very helpful.

6 Ms. Levine, with that, you don't have any doubt as to
7 your client's competence to waive indictment and to enter what
8 I take will be an initial not guilty plea?

9 MS. LEVINE: That's correct.

10 THE COURT: Mr. Fiddelman, how about you, same answer?

11 MR. FIDDELMAN: Same answer, your Honor.

12 THE COURT: Based on Mr. Perez's response to my
13 questions, based on his demeanor as he appears before me, and
14 importantly, based on counsel's independent assessments, I find
15 that he is competent both to waive indictment and to enter a
16 plea which I expect, at least at this state, will be not
17 guilty.

18 All right. Let's turn now to the waiver of
19 indictment.

20 Mr. Perez, the document which contains the charge
21 which you are agreeing will proceed in this case is called an
22 information. It has been issued by the United States Attorney.
23 This is a serious crime. You have a constitutional right to
24 require the government to present evidence to a grand jury
25 which may or may not vote to charge you with this crime.

J4OsPERA

1 Do you understand what a grand jury is?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: All right. If the grand jury did vote to
4 charge you with this crime, the charge would be contained in a
5 document called an indictment rather than an information, and
6 the difference between an indictment and an information is that
7 an indictment would be signed both by the United States
8 Attorney and the foreperson of the grand jury that voted to
9 return the indictment. Whereas, an information is signed just
10 by the United States Attorney because there has been no grand
11 jury.

12 Do you understand that?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Do you wish to give up your right to be
15 charged by a grand jury?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: All right. Mr. Smallman has handed up to
18 me a waiver of indictment form.

19 Ms. Levine, is this your signature?

20 MS. LEVINE: Yes, sir.

21 THE COURT: Mr. Perez, is this your signature dated
22 today?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: It has been witnessed by what is familiar
25 to me as the signature of Mr. Smallman.

J4OsPERA

1 All right. When you signed this form, did you
2 understand that you were acknowledging your willingness to give
3 up your right to be indicted by a grand jury?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: All right. I find a knowing and voluntary
6 waive of the right to be indicted by a grand jury, and at this
7 point, let me just ask you, have you read the information?

8 THE DEFENDANT: Yeah, I --

9 THE COURT: You have?

10 THE DEFENDANT: I have a copy at home.

11 THE COURT: OK. But you have read it, correct?

12 THE DEFENDANT: Yes.

13 THE COURT: Have you had an opportunity to discuss it
14 with Ms. Levine?

15 THE DEFENDANT: Yes, I have.

16 THE COURT: Are you prepared now to enter a plea to
17 the information?

18 THE DEFENDANT: Not guilty, sir.

19 THE COURT: Not guilty. Very good.

20 Anyone believe any further question need to be put by
21 way of arraignment?

22 MR. FIDDELMAN: No, your Honor.

23 MS. LEVINE: No, your Honor.

24 THE COURT: All right. Then having arraigned the
25 defendant and having gotten the summary of the case from

J40sPERa

1 Mr. Fiddelman, can you tell me, Mr. Fiddelman, just about the
2 Rule 16 discovery in the case.

3 MR. FIDDELMAN: Yes, your Honor.

4 So the Rule 16 discovery here will consist of a record
5 of the text message and phone dating app chats between the
6 defendant and the undercover agent, and that would include the
7 photographs and videos that were exchanged back and forth. It
8 will also consist of traditional law enforcement reports, as
9 well as surveillance video from the location, the Dunkin'
10 Donuts, where the final in-person meeting took place and where
11 the defendant was arrested.

12 There are also two physical phones that were ceased
13 from the defendant. The first is his phone, which we
14 understand was the phone used to engage in these
15 communications, and the second is the additional phone that the
16 defendant had on him for purposes of giving as a gift to the
17 undercover.

18 With respect to discovery, in connection with the
19 mitigation process, the government has produced pre-indictment
20 discovery to the defense consisting of the text messages
21 between the undercover and the defendant. The results of a
22 search warrant that was executed on the defendant's social
23 media app account on the dating app that he used to initially
24 connect with the undercover, and that contains all the chats
25 the defendant has engaged in with anyone in the course of the

J4OsPERA

1 use of that dating app, and the defendant's criminal history.

2 So there is only a limited amount of discovery
3 remaining to be produced.

4 THE COURT: What other Rule 16 discovery is there that
5 hasn't been produced?

6 MR. FIDDELMAN: I think there may be some police
7 reports and there is the surveillance video from the in-person
8 meeting.

9 THE COURT: I take it that will be produced soon?

10 MR. FIDDELMAN: Yes.

11 THE COURT: When do you expect to be complete with
12 Rule 16 discovery?

13 MR. FIDDELMAN: I would ask for two weeks yep. The
14 alternative, if defense is willing, we could potentially ask
15 for a longer date because of the possibility that the
16 mitigation process will resolve. Either way is fine with the
17 government.

18 THE COURT: All right. Thank you.

19 Let me hear from Ms. Levine then.

20 Ms. Levine, on discovery, does two weeks make sense to
21 you?

22 MS. LEVINE: Yes. I think if I could return to the
23 timeline of the mitigation submission and then revisit
24 discovery in that context.

25 Mr. Fiddelman is correct that the government asked us

J4OsPERA

1 significant followup questions in response to our submission,
2 that those questions triggered another -- we needed to collect
3 some documentation in order to sufficiently respond. As of
4 yesterday, I think we now have the documentation we need,
5 mostly consisting of medical records, which are somewhat
6 voluminous.

7 But this is all to say, I expect that I can have our
8 submission back to the supplemental submission to Mr. Fiddelman
9 within two weeks. Because we're deep in this negotiation, I'm
10 happy to relieve the government of their discovery, the
11 remainder of their discovery obligation for the time being, if
12 that is their preference and if the court is willing to
13 accommodate that.

14 THE COURT: Let me try it this way. You're probably
15 in the best position to answer the question when it makes most
16 logical sense to have a next conference.

17 MS. LEVINE: I think what I would propose is that we
18 come back here in approximately 30 days with the expectation
19 that I'll have the submission to the government within two
20 weeks, and then the government has two weeks to consider the
21 submission.

22 THE COURT: All right. I guess, look, ideally, if
23 we're destined to have a disposition in this case, it would
24 happen at our next conference --

25 MS. LEVINE: That's correct.

J4OsPERA

1 THE COURT: -- rather than your telling me we have a
2 disposition, but I need to work out some details.

3 MS. LEVINE: Right.

4 THE COURT: I would rather spare everybody the hassle
5 of multiple conferences.

6 MS. LEVINE: By that logic, I probably should have
7 proposed 45 days, so that once the government gets back to us,
8 we then have an opportunity to consider them and the
9 consequences thereof.

10 THE COURT: As it relates to discovery, I guess what
11 I would like to arrange is this. At our next conference in
12 approximately 45 days, either as seems very possible, there
13 will be a disposition entered then. I don't mean to pry in
14 terms of your discussions, but I assume that at least the
15 dispositions you're talking about largely include a guilty
16 plea. There may be a deferred prosecution bid here as well on
17 the assumption that we're talking about a guilty plea. It
18 would be entered at that next conference.

19 If, however, we're not going that route, I would like
20 you by that next conference to have had an opportunity to
21 review the remaining Rule 16 material so that at that
22 conference, you can then tell me whether, for example, there is
23 some suppression motion or what the direction of this case is
24 likely to be.

25 MS. LEVINE: Right.

J4OsPERA

1 THE COURT: I'm happy to schedule this 45 days from
2 now, but may I suggest if you're not clearly on track for a
3 disposition, two thirds of the way through that, about the
4 third-day mark, government, you promptly then complete your
5 Rule 16 discovery so that Ms. Levine has had a chance to make
6 sense of it and guide me as to the future course of this
7 prosecution at that next conference.

8 Work?

9 MS. LEVINE: That's great. Thank you.

10 MR. FIDDELMAN: Yes, your Honor.

11 THE COURT: How about Wednesday, June 5, at ten a.m.?

12 THE DEFENDANT: June what?

13 THE COURT: 5.

14 THE DEFENDANT: My birthday is June 6.

15 THE COURT: June what?

16 THE DEFENDANT: 6.

17 THE COURT: D-Day.

18 THE DEFENDANT: My birthday.

19 THE COURT: Very good. It is a famous date in
20 American history.

21 THE DEFENDANT: Thank you.

22 MS. LEVINE: June 5 is fine.

23 THE DEFENDANT: Yeah.

24 THE COURT: You're 64?

25 THE DEFENDANT: I'm going to be 65, sir.

J4OsPERA

1 THE COURT: You'll be 65 on June 6?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: All right. Got it. So you were born on
4 the tenth anniversary of D-Day.

5 THE DEFENDANT: Yes. Anyway ...

6 THE COURT: All right. Enough about that.

7 MS. LEVINE: June 5 is fine.

8 THE COURT: We'll do June 5 at ten a.m. Very good.

9 Is there an application to exclude time?

10 MR. FIDDELMAN: There is, your Honor.

11 In light of the parties' continuing negotiations over
12 a potential disposition, the government moves to exclude time
13 under the Speedy Trial Act until June 5, 2019, as being in the
14 public interest to allow those discussions to continue.

15 THE COURT: Very good.

16 Any objection?

17 MS. LEVINE: No.

18 THE COURT: All right. I'll exclude time between now
19 and June 5 pursuant to Title 18, United States Code, Section
20 3161(h)(7)(A). I find that the interest of justice outweigh
21 the interest of the defense and the public in a speedy trial.
22 In particular, given the nature of the case, it is unsurprising
23 that there are extensive extended discussions about factors
24 relevant to a potential disposition. Counsel have indicated
25 that those discussions have gone a long way, but need a little

J4OsPERa

1 more time. The extra time is needed to allow you to complete
2 that process.

3 Anything further from the government?

4 MR. FIDDELMAN: No, your Honor. Thank you.

5 THE COURT: Anything further from the defense?

6 MS. LEVINE: No, your Honor. Thank you.

7 THE COURT: I take it that the bail conditions that
8 were set in magistrate's court, you're comfortable staying in
9 place?

10 MR. FIDDELMAN: That's correct.

11 The defendant is on home detention with strict
12 pretrial supervision and a number of other conditions that the
13 government has asked for.

14 THE COURT: I assume there is electronics or either
15 monitor shut down in some way?

16 MR. FIDDELMAN: That's correct.

17 THE COURT: Very good. Thank you. That's fine.

18 We stand adjourned.

19 (Adjourned)